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Western Water and the Reservation Theory - The Need for a Water Rights Settlement Act

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NOTES

WESTERN WATER AND THE RESERVATION THEORY— THE NEED FOR A WATER RIGHTS SETTLEMENT ACT

Federal-state water rights conflicts which have become apparent in the last decade have created a great deal of concern among residents of the West. Federal court decisions have served to becloud the status of water rights, vested under state law, in a land where the certainty of this real property interest is largely determinative of land value and productivity. The concern was prompted initially in 1955 by the famous *Pelton Dam* decision, *FPC v. Oregon,* 349 U.S. 435 (1955). That decision instigated a desire, among westerners particularly, for clarifying legislation to establish the limits of federal authority over waters. No broad-scope remedial legislation has been passed, and since 1955 there have been further judicial pronouncements which make even more imperative the settlement of water rights on a federal-state basis.

The purpose of this paper is to explore the major areas of conflict in the light of the needs of the Western United States as those needs have manifested themselves and developed historically. Legislative proposals designed to solve the conflicts by creating a more unitary and functional institution to better develop water resources will also be considered.

HISTORICAL BACKGROUND OF WESTERN WATER LAW

The common law of water courses in the United States is based upon the riparian rights doctrine. The origin of this doctrine is traceable through Kent and Story to the civil law of France and the *Code Napoleon.*[1]

The first expression of the word "riparian" to describe rights in watercourses is found in *Tyler v. Wilkinson,*[2] a case from which some inferences can be drawn as to the tenets of the riparian doctrine. Mr. Justice Story stated that the owner of land adjacent to a stream is entitled to the land comprising the streambed, covered with water, to the middle of the stream. By virtue of owning that land, he has a right to the use of the water flowing over it in its natural condition, without diminution or obstruction. Since no property is thereby created in the water itself, no proprietor can use the water to the prejudice of another.[3] From these statements come the principles that the riparian theory is based upon ownership of land and embodies protection of correlative rights. Such a theory is perfectly suitable and equitable in the Eastern United States where it was introduced, since that geographical area is characterized by abundant rainfall and ample water supply.

[1]Wiel, *Waters: American Law and French Authority,* 33 HARV. L. REV. 133, 139 (1919).
[2]24 Fed. Cas. 472 (No. 14312) (C.C.D. R.I. 1827).
[3]*Id.* at 474.

On the other hand, the western portion of the United States, generally that land within the seventeen contiguous western states, is not blessed with such an abundance of consumable water. In this part of the country there are vast areas in which rainfall is slight, water extremely valuable, and land virtually worthless unless there is available at least an adequate amount of water to supply domestic uses.[4]

Under these physical circumstances western water law was developed. It is not surprising, then, that western water law ultimately came to be based upon beneficial use of water rather than correlative rights and the appropriation theory rather than the riparian theory.

The seventeen western states were acquired by the United States through purchase and treaty during the first half of the nineteenth century.[5] This land was public domain of the United States and as such was not open for settlement or private acquisition until the passage of the Homestead Act of 1862.[6] For a decade preceding the Homestead Act there had been continuous settlement in the West with a particularly great influx of miners and settlers at the time of the California gold rush in 1849. These miners were trespassers with no proprietary rights in the public domain and extracted gold therefrom with only the implied permission of the United States.[7] As water was of critical importance to the miners because of the mining techniques used, conflicts arose over rights to use water as well as those concerned with the establishment of rights to mine a particular claim. Eastern water law theories of riparianism were not suitable to settle the disputes over water rights because riparian rights are incident to ownership in land. Consequently, local judicial bodies seized upon local customs of appropriation in an effort to peacefully resolve water rights disputes. Under the appropriation approach the first to make a beneficial use of water was protected in that right to the extent of his use. This is a simple application of the "first in time, first in right" theory.

The doctrine of appropriation was soon seen to be peculiarly suitable to the West. In 1855, the Supreme Court of California[8] recognized appropriation as the local custom and applied it as the law of the jurisdiction.

[4]Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of* 1957, 45 CALIF. L. REV. 604 (1957).

> Water, even uncomplicated by Federalism, nurtures controversies which are both long and bitter. Ever since western water rights were first established in the mining camps of the Sierra Nevadas, it has frequently been nip and tuck whether differences of opinion would be resolved by briefs or by bullets.

[5]Specifically, they were: the Louisiana Purchase, Treaty with Franch Republic, April 31, 1803, 8 STAT. 200; the Oregon Country Treaty, Treaty with Great Britain, June 15, 1846, 9 STAT. 869; the Treaty of Guadalupe Hidalgo, Treaty with Republic of Mexico, May 30, 1848, 9 STAT. 922; and the Gadsden Purchase, Treaty with Mexico, Dec. 30, 1853, 10 STAT. 1031. Note, 60 COLUM. L. REV. 967, 968 n.8 (1960). For a graphic depiction of these acquisitions see BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 5 (1963).

[6]12 STAT. 392, 43 U.S.C. § 161 (1958).

[7]5 POWELL, REAL PROPERTY ¶ 734 (1962).

[8]Irwin v. Phillips, 5 Cal. 140 (1855).

The court held that the common law riparian doctrine could not be utilized because neither litigant had a proprietary right. Both were tenants at will only. After the passage of the Homestead Act of 1862 this basis for applying the doctrine of appropriation to the exclusion of the riparian theory disappeared. The question of which of the two doctrines should prevail if there were parties with a proprietary interest in land involved came into issue and remained in doubt for some years. At least a few of the first cases to thereafter face the problem gave the United States patentees riparian rights rather than appropriative rights.[9]

The Congress of the United States by the passage of three very important acts made known its intent in regard to western water law. The Act of 1866 was a federal legitimization of lode mining claims that had been recognized by California laws. It provided:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. . . .[10]

This act expressed the willingness of the United States to recognize private appropriation of public water. By the Act of 1870[11] all United States patents issued after that date were made subject to rights acquired under or recognized by the Act of 1866. This act, in effect, stated that appropriative water rights vested under the Act of 1866 could not be defeated by the assertion of a riparian water right based on a subsequent federal patent. The third act, the Desert Land Act of 1877,[12] was primarily to encourage settlement and reclamation of parts of the arid Western States. It authorized claims to tracts of desert lands with an accompanying water right based on a bona fide appropriation for beneficial use.[13]

The Supreme Court of the United States lent further credence to the belief that Congress had, by the Acts of 1866, 1870 and 1877, assented to the appropriation theory of water rights in contravention of the common

[9]Note, 5 UTAH L. REV. 495, 496 (1957).

[10]14. STAT. 253, 30 U.S.C. § 51 (1958).

[11]16 STAT. 218, 30 U.S.C. § 52 (1958).
"All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by [the Act of 1866] . . . ."

[12]19 STAT. 377, 43 U.S.C. § 321 (1958. Applicable to the states of California, Oregon, and Nevada (Colorado was later added), and the territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota. These states were virtually entirely open to Desert Land Act entries as the era of federal reservations had not yet come into being.

[13]19 STAT. 377, 43 U.S.C. § 321 (1958). Also significant is the provision:
[A]ll surplus water over and above such actual appropriation and use . . . upon the public land and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

law riparian rule. Near the turn of the century the Supreme Court clearly held that states were free to adopt non-riparian systems of water rights and that such state legislation would be recognized under the acts.[14]

In *United States v. Rio Grande Dam & Irrigation Co.*[15] the Court used this language:

> While [the riparian theory obtains in the states which have adopted the common law] it is also true that as to every stream within its dominion a state may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.[16]

Similarly, the decision in *Kansas v. Colorado* held the Colorado doctrine valid as applied in that state. In addressing itself to the conflict of the riparian theory versus appropriation the Court said that "Congress cannot enforce either rule upon any state."[17]

If there were any doubts remaining about the effect of the Desert Land Act and the propriety of the states' adoption of the appropriation theory they were completely laid to rest in the now famous decision of *California-Oregon Power Co. v. Beaver Portland Cement Co.*[18] That case involved an action to enjoin interference with or lessening the volume of the Rogue River, a non-navigable stream in the state of Oregon. The plaintiff had never made an appropriation of water from the stream for a beneficial use but brought his claim solely as a riparian owner of land taken by United States patent under the Homestead Act of 1862.[19] Specifically, the defendant intended to dam and divert water in the stream for a power plant to be located across the river from the plaintiff's land. Defendant obtained its construction permits and certain adjudicated water rights from the state of Oregon. This squarly presented the issue of whether the homestead patent carried with it as part of the granted estate the common law rights which attach to riparian

[14]Gutierres v. Albuquerque Land and Irrigation Co., 188 U.S. 545 (1903).

[15]174 U.S. 690, 702-03 (1898).

[16]The Court did note two important limitations on the power of the states to legislate with respect to the rights of the United States:

> [T]wo limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its water; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. *Id.* at 703.

[17]206 U.S. 46, 94 (1907). This holding might seem all the more significant if the substance of that doctrine is noted. The Colorado Doctrine is based on the theory that full sovereignty to the waters was transferred to the states as they were formed. This rationale would leave the federal government without any proprietary interest in western waters and would deny the necessity of federal consent for a state adopted system of appropriation. In any event, the federal government was thought to have given its consent by the Acts of 1866, 1870 and 1877. Note, *Federal-State Conflicts Over the Control of Western Waters*, 60 COLUM. L. REV. 967, 974 (1960).

[18]295 U.S. 142 (1935).

[19]*Supra* note 6.

proprietorship. The Court held that such rights did not attach. In reaching that conclusion it very properly analyzed the history of western water law.

The Court noted that the Acts of 1866 and 1870 were not meant to protect only those appropriations vested under state law before 1866.

> They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain.[20]

And again in considering the language in the Desert Land Act of 1877:

> If this language is to be given its natural meaning . . . it effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. From that premise, it follows that a patent issued thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed.[21]

The final holding of the Court has become classical in writings on western water law:

> [F]ollowing the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain.[22]

Thus, in 1935, the doctrine of appropriation had been completely accepted. The states at this point had every reason to feel secure in their ability to legislate as they chose in regard to the non-navigable waters within their boundaries. It was settled that even government patentees had only received land titles and had to acquire water rights in accordance with state law.

CONCURRENT FEDERAL ACTIVITY CONCERNING THE DEVELOPMENT AND USE OF WATER WATER RESOURCES.

By virtue of original ownership of all the western lands the United States at one time had plenary power over them and over water rights that were an incident of this proprietorship. The period beginning with the middle of the nineteenth century and the Homestead Act of 1862,

[20] 295 U.S. 142, 155 (1935).
[21] *Id.* at 158.
[22] *Id.* at 163-64.

however, was an era of surrender of federal rights. This was demonstrated by the Acts of 1866 and 1870, and the Desert Land Act of 1877.[23] Congress during this time had emphasized and encouraged the settlement and development of the western lands by individuals. But, near the end of the nineteenth century it became apparent that leaving reclamation to private development under the Desert Land Act was not successful.[24] It was also apparent that the public land generally was being rapidly decimated and the natural resources destroyed. These considerations caused the federal government to undertake conservation and reclamation programs of its own.

These programs began shortly after the turn of the century and largely took the form of vast federal reservations of that which had previously been public land. In 1906, the President was authorized to establish national monuments.[25] The Pickett Act of 1910[26] withdrew all known public oil lands. The Taylor Grazing Act of 1934 authorized withdrawal of the unappropriated public domain for reclassification.[27] The government undertook to develop facilities to reclaim arid lands by the Reclamation Act of 1902.[28] The Federal Power Commission was created and authorized to license private power projects by the Federal Water Power Act of 1920.[29] The Flood Control Act of 1944 provided for construction of multi-purpose water projects.[30]

As a result of the federal government's efforts to reserve and reclaim the western lands after the beginning of the conservation era national forests, national parks, national monuments, defense establishments and Indian reservations were withdrawn from those lands open to public settlement. These withdrawals which began around the turn of the century constituted, as of June 30, 1963, a total of 360,789,045 acres in the eleven contiguous western states.[31] This places under the

[23]Martz has categorized three periods in the development of western water law. Period One is the period of sale (from the Revolution to 1850), Period Two is the period of exploitation and development (from 1850-1900) and Period Three is the period of conservation (1900-). Martz, CASES ON NATURAL RESOURCES, 2-11 (1951).

[24]*Ibid.* That extensive reclamation was never accomplished under the Desert Land Act is further born out by statistics. A total of less than 10½ million acres (10,451,125) have been entered under that Act from March 3, 1877, to June 30, 1963. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 61 (1963).

[25]34 STAT. 225 (1906), 16 U.S.C. § 431 (1958).

[26]36 STAT. 847, 37 STAT. 497 (1912), 43 U.S.C. §§ 141-142 (1958).

[27]48 STAT. 1269, 43 U.S.C. § 315 (1958).

[28]32 STAT. 388, 43 U.S.C. § 371 (1958).

[29]41 STAT. 1077, 16 U.S.C. § 791 (1958).

[30]58 STAT. 887, 33 U.S.C. § 701-1 (1958).

[31]

	Percentage of total state acreage owned by federal government
Arizona	44.764
California	44.521
Colorado	35.968
Idaho	64.601
Montana	29.677
Nevada	85.459
New Mexico	34.912
Oregon	51.899
Utah	68.361
Washington	29.477
Wyoming	48.238

BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 12 (1963).

responsibility of agencies of the United States approximately 48 per cent of the total acreage within those states (with the exception of North and South Dakota) included in the Desert Land Act. Although many of the federal reservations do not themselves directly concern the control or development of water resources, they are all to some degree dependent upon water for their operation and maintenance. As the withdrawal of public lands provides the basis for the reservation theory, it is important to appreciate the increased concern of the federal government with western water during this period and the ultimate magnitude of the withdrawal of the public domain.

Even with greatly increased federal activity in the western states, a study of the federal enactments providing for these projects would prevent any concern on the part of the state legislatures as they seem to demand compliance with state law. Both the Reclamation Act of 1902 and the Federal Power Act of 1920 provided that nothing in those acts should interfere with state laws relating to the control, appropriation, use, or distribution of water, or any vested right acquired thereunder, and that the federal government should proceed in conformity with state laws.[32] The Flood Control Act of 1944[33] provided that the use for navigation should be only that use that did not conflict with a beneficial use, present or future, in the states lying west of the ninety-eighth meridian. A preference was thereby given to beneficial, consumptive uses over non-consumptive uses in a land wholly dependent upon water for its habitability.[34]

Throughout this period it was customary for the federal government to appropriate water in accordance with state laws.[35] It is important to realize, however, that the government's claim to riparian rights was never relinquished, even during the era of federal deferment to state law.[36]

EMERGENCE OF THE RESERVATION THEORY AND OTHER AREAS OF CONFLICT.

Congress had complete legislative jurisdiction over the public domain of the West from the time of its acquisition, even though it encouraged state control and development of western water for a half century. Although it was not used actively, there was, in conjunction to the federal jurisdiction, a proprietary power similar to that enjoyed by a

[32]Reclamation Act of 1902, § 8, 32 STAT. 390. 43 U.S.C. §§ 372, 383 (1962); Federal Power Act of 1920, § 27, 41 STAT. 1077, 16 U.S.C. § 821 (1952); Federal Power Act of 1920, § 9(b), 41 STAT. 1068, 16 U.S.C. § 802(b) (1958).

[33]58 STAT. 887, 33 U.S.C. § 701-1 (1958).

[34]For an exhaustive list of federal statutes demanding compliance with state laws respecting water rights see Corker, *supra* note 4, at 613 n.27; *Hearings on S.* 1275 *Before a Subcommittee of the Senate Committee on Interior and Insular Affairs*, 88th Cong., 2d Sess. 302 (1964) [hereinafter cited as *Hearings on S. 1275*].

[35]Martz, *The Role of the Federal Government in State Water Law*, 5 KAN. L. REV. 626, 633 (1957).

[36]See *supra* note 16, for the limitations expressed in the *Rio Grande* case.

private landowner.[37] When the federal government chose to no longer defer control over the western waters, authority was found for its reclamation and conservation programs under five different clauses in the Constitution.[38] They are the commerce clause,[39] the property clause,[40] the general welfare clause,[41] the war power,[42] and the treaty power.[43] The exercise of authority over western water resources sustained by the Constitution has given rise to some very perplexing areas of conflict over water rights. The greatest controversies deal with the government's assertion of a paramount proprietary interest in derogation of state law, the emergence of the reservation theory, the ability to take private water rights vested under state law without compensation in one circumstance, and the practice of seizing property without proceeding by the usual, orderly process of condemnation.

Although the *Pelton*[44] decision was not the first case in which the United States asserted its supremacy over the states in matters concerning western waters or its paramount proprietary interest in western lands, it is one of the cases that has created the most consternation among those considering federal-state water right conflicts because it provided a definite emergence of the reservation theory. In the *Pelton* case, a license to construct and operate a hydroelectric plant on reserved lands of the United States[45] adjacent to the Deschutes River[46] in Oregon was issued to a private power company by the Federal Power Commission. The state of Oregon, the Fish Commission of Oregon, the Oregon State Game Commission and an interested private group questioned the authority of the Commission to issue the license. They also questioned the efficiency of the Commission approved facilities for conserving anadromous fish. The state and its agencies had prevailed in the Court of Appeals for the Ninth Circuit where it was held that Congress, by its public lands legislation, had transferred to the state of Oregon control over the nonnavigable waters and that permission prescribed by the state was necessary for granting the license.[47] On certiorari, the Supreme Court found the Commission within its discretion in granting the license.

[37]United States v. Midwest Oil Co., 236 U.S. 459 (1915).

[38]See King, *Federal-State Relations in the Control of Water Resources*, 37 U. DET. L. J. 1 (1959).

[39]U.S. CONST. art. I, § 8; Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824); United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940); United States v. Grand River Dam Authority, 363 U.S. 229 (1960).

[40]U.S. CONST. art. IV, § 3; United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899); FPC v. Oregon, 349 U.S. 435 (1955).

[41]U.S. CONST. art. I, § 8; United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958).

[42]U.S. CONST. art. I, § 8; Ashwander v. TVA; 297 U.S. 288 (1936).

[43]U.S. CONST. art. II, § 2; U.S. CONST. art. VI; Missouri v. Holland, 252 U.S. 416 (1920); Winters v. United States, 207 U.S. 564 (1908).

[44]FPC v. Oregon, 349 U.S. 435 (1955).

[45]The western terminus of the dam was to be located on an Indian reservation, reserved by the United States for power purposes since 1910 and 1913. The eastern terminus was on lands withdrawn for power purposes since 1909.

[46]The Deschutes River flows entirely within the state of Oregon. For the purposes of this case it was treated as non-navigable.

[47]211 F.2d 347 (9th Cir. 1954).

The Court, in reaching its conclusion, considered three issues. Initially, they found the Federal Power Act applicable, comparing the instant situation to the *First Iowa Hydro-Electric Co-op v. FPC* case,[48] in which the Federal Power Commission was held to have authority to license a power project on a navigable river in Iowa without evidence of compliance with state law. The jurisdiction of the Commission in the *First Iowa* case was provided by the navigation servitude of the commerce clause while in the *Pelton* case it was based on the United States' ownership of its *reserved lands* and the property clause of the Constitution.[49]

It was in this determination that the highly significant distinction was made between "reservations" and "public lands."[50] The Court said

[48]328 U.S. 152 (1946). The *First Iowa* case is of consequence for several reasons. It squarely faced the issue of whether the applicant for a license had to present evidence of compliance with the laws of Iowa. The Court concluded that to require the granting of a state permit as a condition precedent would give Iowa a veto power over federal projects, destroying the effectiveness of the Federal Power Act.

The Court found the purpose of the Federal Power Act to be the development of idle water resources while avoiding unconstitutional invasion of state jurisdiction. This was to be accomplished by dividing the Constitutional powers, leaving the states with their traditional jurisdiction subject to the superior right of the federal government to regulate interstate commerce, administer public lands and reservations, and exercise authority under treaties of the United States. The federal government has superseded the states in projects over which the Federal Power Act has jurisdiction and only it has final authority.

For those states which were laboring under the misconception that sections 9(b) and 27 of the Federal Power Act were put in the Act to insure state control over waters and federal compliance with state law, the court had a carefully analyzed explanation. Section 9(b) provides: "That each applicant for a license hereunder shall submit to the commission. . . (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State. . . ." This language literally seems to require proof that the applicant has complied with state law. The Court reasoned, however, that since the Federal Power Act has preempted state law in this field, section 9(b) taken in context gives the Federal Power Commission the authority to demand evidence of compliance if it *desires* that evidence but the state permit isn't actually needed. The Commission may require only such compliance with state statutes as it deems material because 9(b) only requests legal, a opposed to factual, information and does not itself require compliance with state laws. Section 27 was explained as being enacted as a "saving" clause so that the act would not be stricken as an unconstitutional invasion of state jurisdiction. It provides:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

The Court limited its effect "to laws as to control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature." "Other uses" does not give general protection to state laws as it was construed as being *ejusdem generis* with the words "irrigation" and "municipal."

It can be seen that this case served to preempt the field in licensing power projects and in removing any presumed protection for the states under sections 27 and 9(b) of the Federal Power Act.

[49]The Federal Power Act of 1920, § 4, 41 STAT. 1065, 16 U.S.C. § 797(e) (1958), expressly gives the Federal Power Commission authority to issue licenses for projects "upon any part of the public lands and reservations of the United States. . . ."

[50]For a note indicating that such a distinction might have been anticipated because of Court decisions considering United States control of water flowing through Indian Reservations see Note, *Indians, Water, and the Arid Western States—A Prelude to the Pelton Decision,* 5 UTAH L. REV. 495 (1957). These cases recognized the right of the United States to control water passing through the reserved lands in accordance with the purpose of the reservation. In several cases open end decrees were granted so that the appropriation of water could be increased with the growing needs of the Indians on the reservation.

that each term had its established meaning in the Federal Power Act:

> "Public lands" are lands subject to private appropriation and disposal under public land laws. "Reservations" are not so subject. . . . Even if formerly they may have been open to private appropriation as "public lands," they were withdrawn from such availability before any vested interests conflicting with the Pelton Project were acquired.[51]

The Court then stated that there was no question constitutionally of the Federal Power Commission's authority to license power projects on reserved lands of the United States, *provided that* "the use of water does not conflict with vested rights of others."[52]

Oregon's argument that the Acts of 1866, 1870, and the Desert Land Act of 1877 had conferred power upon the states to regulate non-navigable water was then summarily dismissed:

> It is not necessary for us . . . to pass upon the question whether this legislation constitutes the express delegation or conveyance of power that is claimed by the State, because these Acts are not applicable to the reserved lands and waters here involved. The Desert Land Act covers "sources of water supply upon the public lands. . . ." The lands before us in this case are not "public lands" but "reservations."[53]

The Court finally concluded after reviewing the provisions made for reregulation of the stream and the preservation of anadromous fish that the Federal Power Commission had acted within its discretion in granting the license.

Notably lacking in the *Pelton* decision is a consideration of the historical development of the West and its great dependence on water, found so vital to the Court's deliberations in the *Beaver Portland Cement* case.[54] This obvious omission caused Mr. Corker to comment: "Perhaps the most basic criticism [of the *Pelton* decision] is that the Court ignored a century of experience with western water rights which has demonstrated that the riparian right is ill suited to a region where water is the limiting factor in land development."[55]

The *Pelton* decision was disconcerting to the western states within the narrow limits of its holding. Of even greater concern is the cloud of uncertainty cast over a much broader portion of western water rights than merely those affected by the ability of the Commission to grant a license for a hydroelectric project on reservations of the United States without securing the permission of the states. That the decision might have far reaching and devastating results was immediately considered and

[51] *Supra* note 44, at 443-44.
[52] *Id.* at 445.
[53] *Id.* at 448.
[54] *Supra* note 18.
[55] *Supra* note 4, at 613.

condemned by Mr. Justice Douglas in his dissenting opinion in *Pelton*. He contended that the act which provided for the withdrawal of public lands did not intend to affect water rights or change the provisions of the Desert Land Act pertaining to water rights:

> I assume that the United States could have recalled its grant of jurisdiction over water rights, saving, of course, all vested rights. But the United States has not expressly done so; and we should not construe any law as achieving that result unless the purpose of Congress is clear.
>
> . . . .
>
> The reason is that the rule adopted by the Court profoundly affects the economy of many states. . . . If by mere Executive action the federal lands may be reserved and all the water rights appurtenant to them returned to the United States vast dislocations in the economies of the Western States may follow.[56]

Other questions which are vital to a determination of the validity of water rights vested under state law are also raised but are undecided by the *Pelton* case. Has *Pelton* served to introduce a concept of federal riparian rights into the West, based on the initial United States' ownership of those lands?[57] How much water was reserved by the United States for its various reservations? Is it to be an indeterminate amount, always subject to increase when the United States desires to take more water for reservation development?[58] If as much water is reserved as is necessary for the purpose of the reservation, what is the date of priority for the federal right? Is the date as of the time of beneficial use, as of the time of initial reservation of land, or does it date back to the United States' sovereignty prevailing at the time of cession? Further, what state control still obtains and what is the relationship between federal and state water rights?

Judicial expressions were soon forthcoming which served notice that the apprehensions about *Pelton* were not mere idle fantasies. Suspicion that the reservation theory might be seized upon to justify broad protection for government use of water to the possible detriment of appropriators under state law was soon confirmed. In fact, applications for water rights were being made by the Navy in accordance with Nevada statutory procedure when *Pelton* was handed down. As a result of the pronouncements in that case the applications were dropped and the Navy chose to rely on its right to take groundwater from wells located on a United States military reservation without permission from the state of Nevada. Nevada ordered compliance with state law or discontinuance of use of water from the wells and sought declaratory relief. The United States District Court in *Nevada ex rel. Shamburger v. United States*[59]

[56] *Supra* note 44, at 456-57.

[57] Munro, *The Pelton Decision: A New Riparianism?*, 36 ORE. L. REV. 221 (1957).

[58] See the holdings of the Indian reservation cases, *supra* note 50.

[59] 165 F. Supp. 600 (D. Nev. 1958).

held that Nevada could not enjoin the federal government from using water of its wells because of noncompliance with state law dealing with appropriation and use of water. The court found authority for its decision in the reservation theory promulgated in *Pelton,* in the paramountcy of of the national government within the scope of its delegated functions,[60] in the ability of the national government to provide conditions appropriate for the accomplishment of the objectives of its projects,[61] and in expediting national defense.

The vice of the decision is not that the United States exercised its constitutional authority to provide the water necessary to make its military reservation functional. Rather, it is that the government chose to proceed in a manner that affords no protection for other users nor any certainty to the amount of water appropriated. The Hawthorne Naval Depot withdraws water from the same underground basin as does the city of Hawthorne. As there is no federal groundwater law providing protection for a common source of supply[62] may not the federal government at some future date simply withdraw all the water it may deem necessary to an increased need on the reservation and eliminate the source of water for the city of Hawthorne?

The principal fear raised by *Pelton,* that the United States would claim an appropriation priority as of the date of reservation on all previously unappropriated water arising on or flowing through federal reservations, was promulgated as law by the Supreme Court in 1963 by the decision in *Arizona v. California.*[63]

In 1928, the Boulder Canyon Project Act[64] was passed. It authorized the Secretary of Interior to construct a dam and other works on the Colorado River "to control floods, improve navigation, regulate the river's flow, store and distribute waters for reclamation and other beneficial uses, and generate electrical power."[65] This vast project would so help to control the river flow and impound flood waters on the Colorado River as to make great quantities of additional water available for irrigation and sustained consumption. As the "first in time, first in right"[66] principle of appropriation obtains in the West, concern was created among the northern Colorado Basin states that fast-growing California would appropriate more than its fair share of the new water supply. An action was

[60]McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
[61]Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958).
[62]Corker, *supra* note 4, at 623.
[63]373 U.S. 546 (1963).
[64]45 STAT. 1057 (1928), 43 U.S.C. §§ 617-617t (1958).
[65]*Supra* note 63, at 560.
[66]This principle was nicely stated in the first case entitled Arizona v. California, 283 U.S. 423, 459 (1931):

> To appropriate water means to take and divert a specified quantity thereof and put it to a beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriators.

brought by the state of Arizona against the state of California to determine how much water each state had a legal right to use out of the waters of the Colorado River and its tributaries. Nevada, New Mexico, Utah and the United States later joined as parties.

The basic issue of the case was resolved by the finding that the scheme of apportionment contained in the Boulder Canyon Project Act was controlling and that the United States was not bound by the theory of equitable apportionment or by state law in disposing of the water. Of great importance was the Court's consideration of claims by the United States to waters of the Colorado and its tributaries for use on Indian reservations, national forests, recreational and wildlife areas and other governmental lands and works. The Court noted that the Special Master had declined claims relating to tributaries while allowing most of the others. They approved his findings almost entirely, discussing those relating to Indian reservations. Rights had been asserted by the government to waters of the mainstream of the Colorado on behalf of five Indian reservations established by acts of Congress and executive orders from 1865 to 1907. It was found, as a matter of fact and law, that when the reservations were created enough water was also reserved to irrigate the irrigable portions of the reserved lands. Over contrary contentions of the state of Arizona, the Court held that the doctrine of equitable apportionment was inapplicable, that the United States was authorized to reserve water for its reservations and property by the property and commerce clauses, and that such reservations could be created by executive order as well as by acts of Congress.

In contrast with the approach in *Pelton,* special attention was paid to the historical needs of the Indians, the nature of western lands, and the absolute necessity of an adequate water supply for irrigation. The *Winters* decision[67] was followed with the Indian water rights being adjudged effective as of the time the reservations were created. As these rights became vested before the Boulder Canyon Project Act was passed they were entitled to priority under the act. Similarly, the Master's conclusion concerning the quantity of water reserved was approved:

> He [the Special Master] found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practically irrigable acreage on the reservations. . . . How many there will be and what their future needs will be can only be guessed. We have concluded . . . that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.[68]

The principles propounded for Indian reservations were then found

[67] *Supra* note 50. Winters v. United States, 143 Fed. 740 (9th Cir. 1906), is the leading Montana decision concerning water rights and Indian reservations.

[68] *Supra* note 63, at 600-01.

"equally applicable to other federal establishments such as national recreation areas and national forests."[69]

By this decision the worst fears of the western states were confirmed. There is no longer any doubt that the United States intends to assert a vested right to enough water to fulfill the ultimate needs of all its reservations with a priority as of the date of the creation of the reservation itself.

LEGISLATIVE CLARIFICATION OF FEDERAL-STATE WATER RIGHTS.

The *Pelton* decision created agitation for legislation which would solve the problems caused by the concurrent assertion of two inconsistent bodies of law applicable to western water. A number of subsequent decisions have made even more apparent certain areas of conflict. Of course, where the position taken by state law is inconsistent with federal legislation, the federal law must control.[70] The proper way to avoid the perpetuation and magnification of the present problems is to modify the federal position by new legislation. Such a modification should be directed not toward stifling the federal government's constitutional authority to act in the field of water law, but rather toward providing a fair solution to the present problems, a clear manifestation of certain rules by which the development of water resources must be guided, and the placing of a very critical resource, one which is not physically amenable to complete control by a single, existing governmental unit, under the control of as nearly uniform system of laws as is possible.

Consideration should be given to a recently proposed act designed to solve federal-state water rights disputes.[71] This proposal should be looked

[69] *Id.* at 601.

[70] U.S. CONST. art. VI.

[71] S. 1636, 89th Cong., 1st Sess. (1965).

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*
>
> SECTION 1. Subject to the exceptions stated in section 5, the withdrawal or reservation of surveyed or unsurveyed lands of the United States, heretofore or hereafter made, shall not affect any right to the use of navigable or nonnavigable water acquired pursuant to State law either
>
> (1) before the establishment of such withdrawal or reservation, or
>
> (2) after the establishment of such withdrawal or reservation, unless, in the latter event, a Federal statute, or an officer of the United States authorized to make such a withdrawal or reservation, shall have promulgated the purpose, quantity, and priority date of the water right reserved to the United States or otherwise established under its own laws, and such promulgation shall have antedated the initiation of the conflicting right under State law.
>
> SEC. 2. Any right to the diversion, storage, distribution, or use of water which the United States or those claiming under the United States assert to have been established under the laws of a State shall be neither greater nor less than those accorded by the laws of that State to uses of water by others than the United States (including the State itself) in like circumstances, and shall be initiated and perfected in accordance with the procedure established by the laws of that State; *Provided,* That this section shall not affect any authority which the United States may have to establish water rights under its own laws, heretofore or hereafter enacted.

to both because it demonstrates the present major areas of conflict and because enlightenment of the citizens of the western states will aid in obtaining passage of remedial legislation.

S. 1636, introduced by Senator Kuchel of California, was drafted by the Senator in collaboration with an expert water lawyer, Northcutt Ely, Chairman of the Water Resources Committee of the Section of Mineral and Natural Resources Law of the American Bar Association. This bill is desirable because it permits the federal government to continue de-

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SEC. 3. No vested right to the diversion, storage or use of any waters, navigable or nonnavigable, acquired under the laws of a State and recognized by the laws in force as of the effective date of this Act in that State as being compensable if taken or used by or under the authority of the State, shall be taken or used by or under the authority of the United States without just compensation. "Vested right" shall mean either (1) an appropriative right initiated in accordance with the general laws of the State applicable to the appropriation of water rights, which has been exercised either by the commencement of actual diversion, storage or use of water, or by the commencement of construction of works for such purposes, and which is thereafter maintained with reasonable diligence in the completion of such works and application of water to such purposes, or (2) a riparian, overlying, or pueblo right, to the extent that such laws of the State recognize such rights, or (3) a prescriptive right or any other water right to the extent that water has been put to beneficial use.

SEC. 4. If works hereafter constructed by or under the authority of the United States impair or interfere with the utilization of any right to the diversion, storage, or other use of water which is vested and compensable under section 3, and if agreement with the owner of said right as to the compensation due for such impairment or interference has not been reached by the time of the initial interference with such right, the United States shall initiate and diligently prosecute proceeding to condemn the same under appropriate Federal or State laws of eminent domain. If it shall fail to do so, no statute of limitations shall apply against a suit by the injured party against the United States for compensation for such impairment or interference in a Federal court of competent jurisdiction; but nothing in this Act shall authorize an action to enjoin such impairment or interference, if such an injunction action could not be maintained in the absence of this Act.

SEC. 5. Nothing in this Act shall be construed as—

(1) modifying or repealing any provision of any existing Act of Congress relative to acquisition by the United States of rights to the use of water pursuant to State law;

(2) permitting appropriations of water under State law which interfere with the provisions of international treaties of the United States;

(3) amending, altering, or repealing any provision of any law which limits the acreage in single ownership that may be served with water made available under the reclamation law: *Provided,* That the same acreage limitations that are imposed by the reclamation law shall be applicable to water made available for irrigation under any other Federal law by users other than Indians, pursuant to a Federal reservation or withdrawal;

(4) affecting, impairing, diminishing, subordinating, or enlarging (a) the rights of the United States or any States to waters under any interstate compact or existing judicial decree, (b) any obligations of the United States to Indians or Indian tribes, or any claim of right owned or held by or for Indians or Indian tribes, (c) any water right heretofore acquired by others than the United States under Federal or State law, (d) any right to any quantity of water used for governmental purposes or programs of the United States at any time prior to the effective date of this Act, (e) any right of the United States to use water which is hereafter lawfully initiated in the exercise of the express or necessarily implied authority of any present or future Act of Congress or State law when such right is initiated prior to the acquisition by others of any right to use water pursuant to State law, (f) any preference accorded by Federal or State law to any public agency with respect to electric power.

SEC. 6. This Act may be cited as the Water Rights Act of 1965.

velopment of water resources if it will recognize and protect certain pre-existing property rights to those waters. That such a requirement is not unduly burdensome is demonstrated by considering the sections of the bill itself.[72]

Section one is designed to alleviate the problems created by the United States' continued assertion and expansion of the reservation doctrine. In essence, it provides that reservation of public lands, either past or future, shall not affect rights to the use of water, either navigable or non-navigable,[73] acquired pursuant to state law in either of two factual situations. The first situation is where water rights were established according to state law before the reservation was established. Presumably this would in no way change existing law because the United States has always purported to recognize rights in existence before the public lands were withdrawn. There are many claims which will not be protected by this provision as a number of the federal reservations were established early in the twentieth century.

The second part of section one is concerned with claims which were vested pursuant to state law after a reservation was created but before the purpose of the reserved water right, the quantity of water reserved, and the priority date were formally established. Its purpose is to eliminate the cloud cast by the reservation doctrine on private water claims, protecting the water user who has made an appropriation of water arising on or flowing through a reservation before the United States formally asserted any claim thereto. It will in effect demand that notice of United States claims be given as to purpose, quantity and date of priority before water claims vested under state law are taken subject thereto. The appropriative theory is clearly subscribed to with any assertion of a federal riparian right being precluded. As it will make surplus water available to subsequent appropriators it will serve to permit the greatest beneficial use of water by private persons, at least until the United States takes by prior appropriation, purchase or condemnation. For the United States to take by prior appropriation it need only give fair notice to subsequent appropriators of the particulars of its prior claim. This is a small burden indeed when the result is to clarify the status of water claims upon which the well being of the Western States now depends.[74]

Section two deals with the situation in which the United States elects to claim a water right by virtue of state law, *i.e.* by prior appropriation, purchase or exchange. The United States does in fact acquire water

[72]For a detailed explanation of the bill, see 56 CONG. REC. 5976 (daily ed. Mar. 29, 1965); *Hearings on S. 1275, supra* note 34. A cogent and persuasive case for the enactment of this legislation has been made by Sen. Kuchel and Mr. Ely and the following arguments are principally derived from their presentations.

[73]It is necessary to include navigable streams as nearly all waters are within that classification after the decisions in United States v. Appalacian Electric Power Co., 311 U.S. 377, 426 (1940); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899); Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941).

[74]A special exemption for Indians on reservations is provided to provide a fair effectuation of the purpose of the reservations and to sustain their productiveness.

rights under state law quite frequently[75] so it should logically be required to comply with state laws and procedure while so doing. The United States recently raised a contrary contention, claiming that California's "statutory . . . procedures for the acquisition of an appropriative water right are police regulations which are inapplicable to the United States."[76] Because of a previous stipulation that the United States sought to establish its claim only under California law in this case the Court did not have to pass on the government's contention. But, section two of S. 1636 is designed to put at rest such a theory altogether. Nothing in this section is intended to affect the United States' procedure in claiming a water right by virtue of its own laws such as by creating a reservation by Congressional act or by the Boulder Canyon Project Act.

A very important part of the bill is section three which would require payment by the United States for its taking of water rights, vested under state law, when the state itself would be required to give compensation for a similar taking. Here, an extremely illogical circumstance existing in modern water law is dealt with. This anomaly is the ability of the United States to utilize a navigable stream or its tributaries and destroy vested water rights without compensation if, and only if, the taking furthers the navigation servitude under the commerce clause.[77]

If the United States takes vested water rights under a Constitutional power other than the navigation servitude of the commerce clause it must pay compensation.[78] It has statutorily provided for compensation under section 8 of the Reclamation Act,[79] and section 27 of the Federal Power Act.[80] It seems illogical to permit a taking of property under the navigation servitude without compensation and to require compensation when other federal powers are exercised. S. 1636 would simply make the fifth amendment guarantee of just compensation complete.

On balance, this provision puts no prohibitive burden on the United States, either procedurally or financially. For example, the cost of acquisition of private water rights for the Central Valley Project in California amounted to less than one percent of total project costs.[81] It seems eminently more fair to place the cost of public projects upon the public rather than upon individual users of water whose property may be made worthless by the seizure of water rights in the name of the navigational servitude.

[75]REVISED CODES OF MONTANA, 1947, § 89-808.

[76]United States v. Fallbrook P.U.D., 165 F. Supp. 806, 829 (S.D. Cal. 1958).

[77]United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Grand River Dam Authority, 363 U.S. 229 (1960).

[78]International Paper Co. v. United States, 282 U.S. 399 (1931).

[79]See the Reclamation Act of 1902, *supra* note 28; United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).

[80]Federal Power Act of 1920, *supra* note 29; FPC v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954).

[81]Ely, *Hearings on S. 1275*, *supra* note 34, at 260.

Care has been taken in defining those water rights which would be compensable under the bill, permitting no special advantages to be asserted against the federal government. Only those rights vested under state law prior to federal taking are included. Neither are state claims involving no more than speculative "paper rights" protected.[82] Furthermore, the test of compensability is limited to state laws in force at the time of passage of the bill. The possibility is thereby avoided "that a State may hereafter create exotic water rights of some kind which the Federal Government may have to pay for."[83]

Section four of S. 1636 prescribes the manner in which state created water rights are to be acquired and compensated for by the federal government. Within the present law there is no orderly process of condemnation adhered to in the seizing of property due to the availability of alternative methods of taking. One of the methods, that of seizing property without instituting condemnation proceedings, places a substantial burden upon the property owner by forcing him to assert his right to compensation by the remedy of inverse condemnation.

The alternative methods of proceeding, condemnation and physical seizure were nicely delineated by the Court in *United States v. Dow*:[84]

> Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act . . . to recover just compensation.

Taking by physical seizure has come to be commonplace and has received approval by the Supreme Court in cases dealing with water rights.[85] An unnecessary hardship can easily be imposed by physical seizure because the burden is shifted to the individual to seek compensation from the United States under the Tucker Act.[86] This necessitates a civil suit in the Court of Claims whenever the amount in dispute exceeds $10,000.[87] It has been admitted that "the Court of Claims is a remote

[82]United States v. Grand River Dam Authority, 363 U.S. 229 (1960). The respondent had a right granted by the state of Oklahoma to construct a hydroelectric project at Fort Gibson on the Grand River. The United States constructed a project at that site before the respondent had exercised his right by beginning a project. respondent's claim to compensation for its "water power rights" at the Fort Gibson site were denied. The frustration of plans and expectations is not a taking within the meaning of the fifth amendment.

[83]Kuchel, 56 CONG. REC. 5978 (daily ed. Mar. 29, 1965).

[84]357 U.S. 17, 21 (1958).

[85]Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958); Dugan v. Rank, 372 U.S. 609 (1963); City of Fresno v. California, 372 U.S. 627 (1963).

[86]62 STAT. 933 (1948), 28 U.S.C. § 1346(a)(2) (1958).

[87]"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of . . . . (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount. . . ." 62 STAT. 933 (1948), 28 U.S.C. § 1346 (a) (2) (1958). See Sochis v. United States, 266 Fed. 446 (E.D. Pa. 1920).

jurisdiction unfamiliar to lawyers and unsympathetic to plaintiffs. . . ."[88] As many claims can be expected to be in excess of $10,000 in a land where the value of property may be nearly totally destroyed if deprived of water, the desirability of the United States initiating direct condemnation proceedings is evident.

Section four of S. 1636 directs the federal government, when it must acquire a vested and compensable water right, to enter into negotiations with the property owner in the first instance. If such negotiation fails "the United States shall initiate and diligently prosecute proceedings to condemn the same." Should a property owner be deprived of his water rights without having been joined in a condemnation suit, *i.e.*, when it was not initially apparent that this particular individual would suffer any damage, the right of inverse condemnation is still available to him and no statute of limitations shall run against such a suit.[89]

The effect of this provision is to lend consistency to the process of acquiring property, to place the burden of going forward on the federal government and to avoid undue hardship to individuals. As it specifically denies any new causes of action for injunctive relief and does not operate to impede or hinder the progress of federal developments, it will serve to give greater protection to individuals without detrimental effect on federal projects.

CONCLUSION

Water rights problems are not simple of resolution under any circumstances but such is particularly the case when they are presented on a federal-state level. It is historically proved that the appropriation theory is desirable in the West. Further, as water rights are real property rights, certainty is essential. On the other hand, water is a fugacious natural resource moving inevitably from jurisdiction to jurisdiction and the greatest utilization can be made of water under vast projects which would coordinate water control and storage among widespread areas. From a practical standpoint such extensive coordination can best be achieved and financed by the federal government, making it undesirable to strictly limit federal activities. The most reasonable course appears to be to remove the inequities in the present means of developing western waters while attempting to create a system of controls which will foster certainty, trust, and cooperation between state and federal agencies. In this regard, it is hoped that a greater awareness among the citizens of the western states of the problems existing in present water law will result in support for a more expeditious and productive management of one of this country's most critical natural resources.

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[88]Goldberg, *Hearings on S.* 1275, *supra* note 34, at 125.

[89]The present statute of limitations applicable to the Court of Claims is six years after the claim first accrues. 62 STAT. 976 (1948), 28 U.S.C. § 2501 (1958).